IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

80-6256

NO: A-669

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BENJAMIN A. BERRY,

PETITIONER

VERSUS

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STATE OF LOUISIANA,

RESPONDENT

BRIEF ON BEHALF OF THE STATE OF LOUISIANA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED FOR REVIEW

Whether or not prosecutor's closing argument in sentencing phase, which included recitation of appellate procedure, constituted prosecutorial misconduct.

PARTIES

Relator Benjamin A. Berry, convicted of first degree murder in violation of R.S. 14:30 and respondent, the State of Louisiana, are the only parties to this case.

OPINION BELOW

This case is reported at State vs. Berry, 391 So.2d 406 (1980) (reh.den. November 26, 1980).

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STATEMENT OF THE FACTS AND OF THE CASE

On January 30, 1978 at approximately 11:15 a.m. the petitioner, Benjamin A. Berry walked into the Metairie Bank and Trust Company on Metairie Road, drawing a gun. The petitioner shot at the policeman on security guard duty, Robert Cochran. Four shots were fired: one hit the policeman in the arm, causing him to fall to the floor and a subsequent shot was fired into the back of his head. At the time of the shooting there were approximately twelve people in the bank. Deputy Cochran did fire one shot with his service revolver, which struck the petitioner. The petitioner was seen running out of the bank after the shooting. After an investigation, a warrant was obtained to search the body of the petitioner, the search of which revealed one spent bullet from the petitioner's back. Stipulations at trial included that if technician, Ron Singer, would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. Deputy Cochran subsequently died from a bullet wound of the head.

On September 15, 1978 a grand jury indictment was filed charging the petitioner, Benjamin Berry, with first degree murder of police officer Robert Cochran on or about January 30, 1978.

Trial was held on October 24, 1978 before Honorable Frank V. Zaccaria, Judge presiding. Prosecuting attorneys were Gordon K. Konrad, Esq., and Patrick C. Leitz, Esq. The defendant was represented by Fred A. Blanche, III, Esq. The plaintiff was represented by Fred A. Blanche, III, Esq. The plaintiff took the stand in his own defense, alleging that he did in fact plan an armed robbery but that the police officer was not intentionally shot.

On October 26, 1978 a jury of twelve found the plaintiff guilty of first degree murder by unanimous verdict. After a sentencing hearing, the jury unanimously recommended the plaintiff be sentenced to death. On December 6, 1978 the plaintiff, age 23, was sentenced pursuant to the jury recommendation, to death by electrocution.

REASONS FOR DENYING THE APPLICATION FOR WRIT

. No Federal right involved.

The State submits the relator's issue involves a State statute and not a Federal right, consequently requires dismissal of this habeas corpus petition. Van Poyck vs. Wainwright, 595 F. 2d 1083 (1979); Wilson vs. Fogg, 571 F.2d 91 (1978); Hailey vs. Dorsey, 580 F.2d 112 (1978). In any event, none of the alleged errors rise to constitutional magnitude. United States vs. Stone, (Slip page No. 442) ____F.2d ____ (Decided October 16, 1979).

The Louisiana Supreme Court specifically stated in State vs. Berry, 391 So.2d 406 at 418 in its per curiam in the denial of relator's application for rehearing, that "any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a fair trial in the sentencing phase, and the penalty should be vacated.

But virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility. The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.

In the present case the prosecutor, in rebuttal during closing argument, reviewed in detail the capital sentencing statute. He discussed each aggravating circumstance listed in La. C.Cr.P. Art. 905.4, pointing out the applicability or inapplicability in the present case, and then reviewed each

mitigating circumstance listed in C.Cr.P. Art. 905.5, pointing out that none had even been argued by the defense. Finally, conceding that this is not a "measuring contest," he stated that the presence of aggravating circumstances and absence of mitigating circumstances did not compel imposition of the death penalty, but that the enumerated circumstances were simply considerations listed by the Legislature to guide jurors in determining their recommendation.

Continuing his commentary on the fairness of the legislative scheme, the prosecutor stressed that the statute provided every possible safeguard against arbitrary imposition of death sentences, pointing out that the district attorney, the trial judge, the jury and the Supreme Court must all agree that the death penalty is appropriate in the particular case.

Thus, the import of the closing argument was to tell the jury (1) that the statutory scheme, recognizing the seriousness of the consequences, provided adequate safeguards against arbitrary imposition of the death sentence, and (2) that weighing of all the considerations enumerated in the statute warranted imposition in this case. The argument did not serve to lessen the significance of the jury's role in the overall scheme.

In any event, the jury had been sworn in and accepted under the condition that they would perform their duties as they heard the evidence (testimonial, demonstrative, direct, circumstantial) and from instructions from the trial judge. The jury was specifically and emphatically told that all argument from the defense counsel and the prosecutor would not be considered as evidence but only as argument. In the instant case, the recondite remark about appellate review was clearly in argument.

In view of the three aggravating factors on which the jury based its recommendation for the death penalty (where only one such aggravating circumstance was necessary) the State submits the jury did not hesitate in meeting its responsibility. U.S. v. Cook, 592 F.2d 877 (CA 5, 1979).

"Without more," as the expression goes, relator does no more than speculate on the jury's decision-making process.

CONCLUSION

FOR THE FOREGOING REASONS, the State submits that there has not been any denial of any constitutionally guaranteed rights to the relator and that the application for writ should be denied.

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PROOF OF SERVICE

I hereby certify that three copies of the foregoing have been sent to Fred A. Blanche, III, Attorney for Relator, 423 Spain Street, P. O. Box 3295, Baton Rouge, Louisiana 70821, by placing in the United States mail, postage prepaid, this 24th day of April, 1981.

ABBOTT J. REEVES